FOR ARGUMENT

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No. 77-911

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBBINS TIRE AND RUBBER COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae* pursuant to the written consent of all parties.[1] The EEAC supports the position of the respondent, Robbins Tire & Rubber Company, in urging the Court to affirm the decision of the Fifth Circuit Court of Appeals.

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[1] Their consents have been filed with the Court Clerk.

INTEREST OF THE *AMICUS CURIAE*

EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose.

Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* (61 Stat. 136, 73 Stat. 519, 88 Stat. 395). As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether the Fifth Circuit properly ruled that the Freedom of Information Act (FOIA) (5 U.S.C. § 552, *et seq.*) does not permit the National Labor Relations Board to adopt a *per se* rule of refusing to disclose to Board respondents the written statements of those persons who the Board has indicated would be called to testify in Board hearings. In particular, insofar as the NLRB involves itself in issues involving equal employment,[2] the availability

[2] *See, e.g., Emporium Capwell Co.* v. *Waco*, 420 U.S. 50 (1975); *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938); and *Westinghouse Electric Corporation*, pending NLRB Case No. 6-CA-7680 (Whether the Administrative Law Judge properly recommended that the employer be required to turn over to union copies of its EEO-1 form, affirmative action plans and other equal employment data). In the latter case, EEAC submitted a brief *amicus curiae* and participated in oral argument before the full Board. *See also* Axelrod & Kaufman, *Mansion House-Bekins-Handy Andy: The NLRB's Role in Racial Discrimination*, 45 Geo. Wash. L. Rev. 675 (1977).

of witness affidavits in Board proceedings will have great importance to the interests of EEAC's membership.[3]

Moreover, as a group of employers concerned with procedures under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) and other equal employment statutes and regulations, EEAC has a strong interest in the impact which the Court's decision in this case can be expected to have on Title VII litigation involving the Equal Employment Opportunity Commission (EEOC) and the United States Department of Justice. Recently, the Fourth Circuit held that the FOIA did not permit the EEOC to apply a *per se* rule of refusing to provide its litigation adversaries with copies of the affidavits of charging parties. *See Charlotte-Mecklenburg Hospital Authority* v. *Perry*, —— F. 2d ——, 16 FEP Cases 680 (4th

[3] Because of its interest in issues pertaining to equal employment, the EEAC has sought and been granted permission by this Court to file briefs as *Amicus Curiae* in a number of recent cases which raised both substantive and procedural Title VII issues. *See, e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977); *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 14 FEP Cases 1505 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 14 FEP Cases 1510 (1977); *Christiansburg Garment Co.* v. *EEOC*, 98 S.Ct. 694 (1978) and *Gardner* v. *Westinghouse* (No. 77-560).

Cir. 1978).[4] The court and the parties in that case based their arguments primarily on relevant decisions arising under the National Labor Relations Act. Indeed, the Fourth Circuit adopted the reasoning of the Fifth Circuit in the instant case. *See* 16 FEP Cases at 683, 685 n. 5. *Cf. EEOC* v. *Los Alamos Constructors*, 382 F. Supp. 1373 (D.N. Mex. 1974).

STATEMENT OF THE CASE

Briefly, in the consolidated unfair labor practice and representation proceeding before the NLRB, the employer submitted to the Board a FOIA request asking that within seven days of the hearing it be provided the statements in the Board's possession of witnesses the Board intended to call to testify. The Board refused to comply with the request, relying on Exemptions 5, 7(A), (C) and (D) of the FOIA. The district court, however, ordered that the statements be turned over to the employer. On appeal, the Fifth Circuit affirmed the district court's decision. Both courts specifically rejected the Board's position that it should *never* have to turn over such documents prior to trial because disclosure *might* subject witnesses to intimidation or harassment. The Fifth Circuit held that the Board's *per se* approach was inconsistent with the legislative history of the FOIA, and that the Board had not sustained its burden of

[4] New charge processing procedures adopted by the EEOC while the *Charlotte-Mecklenburg* case was pending, which provide in part for predetermination discussions of evidence between the agency, the respondent and the charging party, and which may be inconsistent with both the EEOC's position in that case and the Board's position here, are discussed *infra* at pp. 22-24.

proving that disclosure would produce witness interference in this particular case.

SUMMARY OF ARGUMENT

I.

Congress amended the FOIA in 1974 to rectify its construction by various courts which had approved mechanical or *per se* rules of nondisclosability under Exemption 7 where documents were part of an "investigatory file." The amendments to Exemption 7 provide six specific factors which can justify nondisclosure of all or part of a document where, but only where, an agency proves a statutorily recognized harm from disclosure "in the context of the particular enforcement proceeding."[5] The Congressional design anticipates *in camera* examination of documents at issue by the district court as a normal part of determining whether the agency has borne its burden of proof on an exemption claim, or as to whether any portion of a document was "segregable."

In this case the Board cites Exemption 7(A), claiming that disclosure of witness statements would interfere with its enforcement proceeding. The Board has submitted no proof in support of its claim of *per se* exemption for witness statements in its investigatory files. Rather it theorizes that disclosure would dry up or subject to retaliation its information sources and give earlier access to investigatory file material to respondents.

The lower courts herein correctly rejected the Board's *per se* claim, finding it incompatible with the

[5] 120 Cong. Rec. S17,033 (1974) (Remarks of Sen. Hart).

language and legislative intent expressed in the 1974 FOIA amendments. The Board's interpretation of Exemption 7(A) would nullify the *in camera* and "segregable records" provisions of the FOIA and resurrect the mechanical approach to the exemption that Congress proscribed. Moreover, the Board's theory of interference is speculative and is notably at odds with the face-to-face factfinding procedure of the Equal Employment Opportunity Commission which brings charging parties and their employers together precisely for the purpose of discussing the issues and facts underlying a discrimination charge.

The Board's blanket claim to Exemption 7(A) for all witness statements is demonstrably invalid on other grounds. Many types of witness statements, including those of former employees, charging parties, exculpatory statements, union officials' statements, supervisors giving evidence in cases of union unfair labor practices, statements of non-employee, non-union, and non-employer related individuals, by nature simply do not give rise to the purported harms of disclosure on which the Board seeks to justify its policy. Accordingly, the decision below rejecting the Board's position was correct, since in enacting the 1974 amendments "Congress intended to proscribe the use of a mechanical test such as that enunciated in *Title Guarantee* in favor of a case by case factual inquiry in determining whether to require disclosure of investigatory records." *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, —— F.2d ——, ——, 16 FEP Cases 680, 685 (4th Cir. 1978).

II.

The Board also misconstrues Exemption 5 of the FOIA when it argues that these witness statements constitute "intra-agency memorandums" or its attorneys' "work product." As this Court noted in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 89 (1973):

> [v]irtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand and purely factual, investigative matters on the other.

Accord, NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). Under these cases, Federal agencies may not retain, in the face of a FOIA request, factual or investigative materials which are severable from the agency's deliberations. Relying on these Supreme Court decisions, the decided cases hold that witness statements fall into the "factual" category and therefore are not memoranda under Exemption 5. *See, e.g., Deering Milliken, Inc.* v. *Irving*, 548 F.2d 1131 (4th Cir. 1977).

Furthermore, the Board's assertion that these statements are the "work product" of its lawyers [6] ignores the decision in *Goldberg* v. *United States*, 425 U.S. 94 (1976), which held that a testimonial statement prepared by a government attorney and signed by the witness was *not* to be construed as a work product protected from disclosure.

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[6] The Board cites *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

ARGUMENT

I. THE BOARD'S ASSERTION OF *PER SE* NONDISCLOSABILITY OF WITNESS STATEMENTS CANNOT BE SUSTAINED UNDER EXEMPTION 7(A) OF THE AMENDED FOIA

This Court has stated emphatically that Congress passed the FOIA "to establish a general philosophy of full agency disclosure" and structured it so as to make "virtually every document generated by an agency . . . available to the public . . . unless it falls within one of the Act's nine exemptions." *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975). The legislative history of the FOIA justifies this broad construction of the statute. Because agency exemption claims sustained by the courts had seriously eroded the philosophy of the original 1967 FOIA, Congress amended the FOIA in 1974.[7] The amended Act makes clear that the burden of proving that any document is exempt is on the agency. 5 U.S.C. § 552(a)(4)(B). Moreover, it vests the courts with responsibility to test claims of exemption on a case-by-case basis. To carry out this duty, the 1974 amendments specifically authorize the courts to examine requested documents *in camera* to determine whether all or any part of the documents qualifies for an exemption.

The position of the Board herein, and of the courts following *Title Guarantee Co.* v. *NLRB*, 534 F.2d 484 (2d Cir.), *cert. denied*, 429 U.S. 834 (1976),

[7] *See* 45 Geo. Wash. L. Rev. 114, 117-20 (1976); *Fuselier* & Moeller, *NLRB Investigatory Records: Disclosure Under the Freedom of Information Act*, 10 U. Rich. L. Rev. 541, 542-43 (1976).

again ignores the Congressional intent and establishes categories of *per se* nondisclosable documents without the required agency showing that interference with an enforcement proceeding would result from disclosure. This approach eviscerates the *in camera* examination and "segregable records" provisions of the amended Act and erroneously returns to the improper mechanical approach that prompted Congress to amend the Act in 1974. *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, —— F.2d ——, 16 FEP Cases 680 (4th Cir. 1978).

A. The Language and Purpose of Exemption 7(A) Require Case-By-Case Evaluation of Agency Assertions That Disclosure Would Interfere With An Enforcement Proceeding

Exemption 7 of the FOIA as originally enacted, covered "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 80 Stat. 251. The courts eventually construed that provision to permit nondisclosure upon the simple assertion by an agency that a document was contained in an investigatory file compiled for law enforcement purposes.[8] Dissatisfaction with this "wooden and mechanical" rule of nondisclosability caused Congress to amend the Act.[9]

[8] *See, e.g., Center for National Policy Review on Race and Urban Issues* v. *Weinberger*, 523 F.2d 370 (D.C. Cir. 1974); *Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974); *Aspin* v. *Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Weisberg* v. *Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

[9] As amended Exemption 7 (5 U.S.C. § 552(b)(7)) covers:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production

120 Cong. Rec. S17,034 (1974) (Remarks of Sens. Hart and Kennedy). *See Charlotte-Mecklenburg Hospital Authority* v. *Perry, supra,* —— F.2d at —— 16 FEP Cases at 685. Senator Hart, the author of the amendment, stated that its purpose was to eliminate the "stone wall" created by this *per se* approach and to require the courts to decide each case on the unique facts presented. 120 Cong. Rec. S17,033 (1974). Specifically addressing the latter point, Senator Hart stated (*id.*):

> In determining whether or not the information to be released will interfere with a law enforcement proceeding *it is only relevant to make such determination in the context of the particular enforcement proceeding.* (emphasis added).

Echoing this view of the statute, the "Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act" (Feb. 1975) (hereafter Attorney General's Memorandum) states that Senator Hart's amendment would "require consideration of the *particular document* and the need to withhold it." *Id.* at 5. (Emphasis added). *Accord,*

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of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal nvestigation, or by an agency conducting a lawful national security intelligence investigation confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

Charlotte-Mecklenburg Hospital, supra, —— F.2d at ——, 16 FEP Cases at 685.

The legislative intent embodied in the six clauses of Exemption 7 [10] was to limit application of the exemption to instances in which the agency proves disclosure of a particular investigatory record would cause one of the specific delineated harms.[11] The amendment requires that the government "specify some harm in order to claim the exemption" and does not "afford . . . all law enforcement matters a blanket exemption." 120 Cong. Rec. H 36626 (1974) (Remarks of Cong. Reid). To prevail here, the Board must demonstrate that harm to its enforcement proceeding "will occur." *McDonnell Douglas Corp.* v. *NLRB,* 92 LRRM 2072, 2073 (C.D. Cal. 1976), *app. pending,* No. 76-1580 and cases there cited. *Accord, Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1131, 1135 (4th Cir. 1977).

When the government seeks to utilize one of the specific provisions of Exemption 7 to prevent disclosure, the party requesting the information has the right to challenge the nondisclosure in district court. 5 U.S.C. § 552(a)(4)(B).[12] In such an action, Con-

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[10] *See* note 9 *supra.*

[11] *See NLRB* v. *Hardeman Garment Co.,* 406 F. Supp. 510, 91 LRRM 2853, 2854 (W.D. Tenn. 1976) (The court "must be furnished the documents in question before making this determination under all of the circumstances.").

[12] Section (a)(4)(B) of the Act provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has

gress explicitly placed on the agency the burden of proving by a preponderance of the evidence, the applicability of the claimed exemption. *Id.*

To facilitate the case-by-case adjudication of claims of exemption noted by Senator Hart, the 1974 amendments authorize the district courts to examine *in camera* all requested documents. *See* note 12 *supra.*[13] Indeed, *in camera* examination was expected to be the normal procedure in reviewing agency nondisclosure. Thus, the Attorney General's Memorandum states that (pp. 5-6): "Because of the change from 'files' to 'records' and the provision concerning reasonably segregable portions of records [14] . . . the particular documents must ordinarily be examined." [15] The Attorney General went on to state that exceptions to the individual *in camera* examination procedure were "obviously likely to be rare, at least with respect to presently existing files." *Id.* at 6 n. 6. Board files containing witness statements were, of course, "presently existing files."

Despite the amendments to the FOIA, the Board seeks a blanket exemption for all witness statements in its "open" investigatory files.[16] In this case the Board neither submitted the statements to the district court for *in camera* examination nor provided any evidence whatsoever of the purported harm to its enforcement proceeding from disclosure of the requested statements. (Pet. app. 120). In fact, the Board represented to the district court that *in camera* examination was unnecessary as there was absolutely

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jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

[13] Various courts had interpreted the 1967 Act not to include provision for *in camera* examination. *See, e.g., Aspin* v. *Dept. of Defense,* 491 F.2d 24, 27 (D.C. Cir. 1973); *Weisberg* v. *Dept. of Justice,* 489 F.2d 1195 (D.C. Cir. 1973), *cert. denied,* 416 U.S. 993 (1974). *See also Frankel* v. *SEC,* 460 F.2d 813 (2d Cir.), *cert. denied,* 409 U.S. 889 (1972).

[14] *See* section (a)(4)(B) in note 12 *supra.* "The legislative history of [the provisions for *in camera* inspection and disclosure of reasonably segregable portions of documents containing some exempt material] indicates that Congress intended to codify a deletion principle, already applied in numerous instances by courts and agencies, so as to prevent the withholding of entire records or files merely because portions of them are exempt, and to require the release of nonexempt portions. (H. Rep. No. 92-1419 on Administration of the Freedom of Information Act, pp. 55, 72 (92d Cong. 2d Sess. 1972); H. Rept. p. 7; S. Rept. pp. 17, 31, 32; 120 Cong. Rec. 9313 (May 30, 1974) (Senator Kennedy); and *see, e.g., Bristol Myers Co.* v. *FTC,* 424 F.2d 935, 939 (D.C. Cir. 1970); *Gruman Aircraft Engineering Corp.* v. *Renegotiation Board,* 425 F.2d 578 (D.C. Cir. 1970)." Attorney General's Memorandum at 14.

[15] *See Kaminer* v. *NLRB,* 90 LRRM 2269, 2272 (S.D. Miss. 1975).

[16] Moreover, the Board, contrary to the decisions of the Tenth and Second Circuits, *Poss* v. *NLRB,* 565 F.2d 654 (10th Cir. 1977), *Title Guarantee Co.* v. *NLRB,* 534 F.2d 484 (2d Cir. 1976), *cert. denied,* 429 U.S. 834, apparently still claims a *per se* exemption even for entire "closed" case files. *See,* Board brief at 33 n. 17.

nothing unique about the statements at issue here. (Pet. app. 62).

The Board's alleged proof of harm to its enforcement proceeding consists solely of generalized assertions that disclosure of witness statements could (1) provide charged parties with premature disclosure of the government's investigation and permit the party to construct defenses and (2) inhibit employees from volunteering information for fear of reprisal. Although *Title Guarantee* and its progeny accepted these arguments, they do not withstand scrutiny under the amended FOIA.

The Board and the precedents upon which it relies ignore the thrust of the 1974 amendments, "to require consideration of the particular document and the need to withhold it." Attorney General's Memorandum at 5. Illustrative of this approach, *Climax Molybdenum Co.* v. *NLRB*, 539 F.2d 63, 65 (10th Cir. 1976), a decision principally relied on by the Board,[17] holds that Congress could not have intended the courts "to determine on a case by case basis whether a particular file would interfere with NLRB enforcement proceedings." That court also stated that because of the potential for employer retaliation or coercion "there is no need for an express showing of interference in each case" to invoke Exemption 7(A). *Id. Accord*, *Title Guarantee*, *supra*, 534 F.2d at 491-92. Each of these contentions is at war with both the statutory language and the legislative history. For, as shown above, "it is only relevant to make [an interference] determination in the context of the particular enforcement proceeding." 120 Cong. Rec. S17,033 (1974) (Remarks of Sen. Hart).[18]

[17] *See, e.g.*, Board Br. 34, 40.

The Board's protracted argument that Congress did not intend to give earlier access to investigatory files or to disrupt the cases construing the 1967 FOIA which held witness statements *per se* privileged is wide of the mark. For, as shown, the entire object of the 1974 amendments was to eliminate the court decisions which had adopted *per se* rules of nondisclosability. Instead, Congress inserted the requirement of case by case analysis with the courts conducting *in camera* examinations to determine whether an agency had concretely proved that interference would occur upon disclosure. The legislative history does not support the Board's contention that Congress sought only to overrule certain non-labor District of Columbia Circuit decisions. (Br. 26-27). Thus, Senator Kennedy noted that Congress was disapproving of the District of Columbia decisions but that the Congress also wanted to eliminate the precedential value of any cases restricting access on the basis of *per se* rules. Senator Kennedy stated (120 Cong. Rec. S 17035 (1975):

[18] *See* Comment, *The Impact of the FOIA on NLRB Discovery Procedures*, 10 U. Mich. J. L. Ref. 476, 493 (1977).

There is no reason to expect a continuing abundance of FOIA suits if the Board's mechanical nondisclosure rule is rejected in favor of the case by case approach mandated by Congress. Standards will quickly develop and the decision in this case will substantially answer questions on disclosability of statements, just as the decision in *NLRB* v. *Sears*, *supra*, substantially resolved questions of the availability of bona fide Board memoranda.

> Judicial and agency adherence to the requirements of these amendments should go a long way to removing strict and undiscriminating adherence to narrow interpretations of the Freedom of Information Act. This would apply to the area of investigatory files as well as to the other exemptions of the Act. So I think that *courts would have to reconsider their reliance on any restrictive cases after passage of these new provisions anyway.* (emphasis added).

The *Wellman Industries Inc.* v. *NLRB*, 490 F.2d 427 (4th Cir.), *cert. denied*, 419 U.S. 834 (1974), line of cases relied upon by the Board were clearly examples of the restrictive *per se* line of cases to which Senator Kennedy's remarks had reference. Such decisions cannot maintain their vitality when considered in light of the full purposes and history of the 1974 amendments.

The Fourth Circuit recently recognized that *Wellman* was clearly among the cases applying Exemption 7 in an overbroad fashion, *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, *supra*, —— F.2d at ——, 16 FEP Cases at 685, and that "[t]o correct this application of exemption 7 by the courts, the Congress in 1974 amended exemption 7" to limit its application to situations where the agency could prove a specific interference with an enforcement proceeding. *Id.* And exactly contrary to the Board, the Fourth Circuit has noted that courts must determine each claim "with an adequate factual basis," utilizing the *in camera* inspection. *Id.* Thus the Board's chief case in support of its *per se* approach is no longer viable precedent.

The Board's interpretation of Senator Hart's statements that earlier access to investigative files was unintended ignores Senator Hart's express declaration that interference was to be determined on the basis of proof in each particular case. Senator Kennedy's expression shows that the Congressional intent in amending the FOIA was not limited to overruling several District of Columbia Circuit decisions. In any event, this Court has previously stated that when "faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure." *Department of the Air Force* v. *Rose*, 425 U.S. 352, 366, *quoting Vaughn* v. *Rosen*, 523 F.2d 1136, 1142 (D.C. Cir. 1975).

B. The Board's Claim of Potential Interference With Enforcement Proceedings Does Not Justify Its Blanket Policy of Nondisclosure of Witness Statements

Even if generalized claims of interference with enforcement proceedings could suffice to invoke Exemption 7(A) of the amended FOIA, the Board's speculative assertions of possible interference with such proceedings are inadequate to justify its broad policy of nondisclosure of witness statements. The crux the Board's argument is the thesis that employees will be subject to retaliation and coercion and will be inhibited from giving evidence to the Board. But without specific evidence of a particular respondent's proclivity to such actions, as required by the court of appeals here, (563 F.2d at 722, 96 LRRM at 3134-35), that thesis cannot be sustained.

1. *There is no support for the Board's premise that pretrial disclosure of witness statements will increase the danger that witnesses will be coerced or intimidated*

The Board asserts that employees will be reluctant to give evidence if they know that their statements can be disclosed to their employer. However, even under the Board's approach there is no real assurance of confidentiality. Frequently the Board obtains statements without giving such assurances. *Maremont Corp.* v. *NLRB*, 91 LRRM 2804, 2809 (W.D. Okla. 1976), rev'd on other grounds, 93 LRRM 2799 (10th Cir. 1976). In *Maremont*, it was noted that the Board "admits that the witnesses . . . were never given assurances of confidentiality" by the Board agent. 91 LRRM at 2809. The court concluded that "[w]ith no such assurances of confidentiality, it is hard to see where these witnesses would have been reluctant to come forward if their identities and affidavits were to become known to the company under F.O.I.A." *Id.* at 2809-2810. Similarly, in *McDonnell Douglas Corp.* v. *NLRB*, *supra*, 92 LRRM at 2075, the court stated that the Board had "not contended that the witness statements requested here were given to the [NLRB] with a promise of confidentiality." Moreover, after considering the following four factors: "(a) the nature and contents of the witness statements; (b) the nature of the underlying unfair labor practice proceedings, (c) the Board's own Rule and Regulations and (d) the representation of counsel for the [NLRB] that each of the witnesses involved would be called and each of the witness statements involved would in any event be turned over to plaintiff at the hearing in Board Case No. 21-CA-

13835," the court concluded that "no promise of confidentiality or anonymity could reasonably be inferred." *Id.* See *Title Guarantee Co.* v. *NLRB*, *supra*, 534 F.2d at 489 n. 11 and cases there cited.

Indeed, since any important witness will be called to testify at the hearing, the only real question as to disclosure of the statement relates to the time of disclosure—prehearing as ordered by the courts below or post testimony pursuant to the Board's Jencks Act Rule, 29 C.F.R. 102.118(b). In such a situation, the Board delays but does not eliminate the possibility of retaliation against an employee witness. As the Fifth Circuit aptly analyzed the situation:

> [T]he Board's own house rule, 29 C.F.R. § 102.118 (1968), contemplates the delivery after the witness has testified, of all his pre-trial statements held by the Board. This regulation, we think, further negates the contention that discovery would improperly expose informers, since it requires that statements of witnesses be turned over anyway. We are unable to see how the danger of coercion or reprisal becomes greater if we require that the statements to the Board of witnesses who testify be turned over at the discovery stage rather than during the course of the hearing.

NLRB v. *Schill Steel Products, Inc.*, 408 F.2d 803, 805 (5th Cir. 1969). *Accord*, *McDonnell Douglas*, *supra*, 92 LRRM at 2075.

While the Board speculates that pretrial disclosure of witness statements may lead to coercion and intimidation, the opposite may actually be true in many cases. Release of an employee's statement before trial may enhance the protection against retaliation. Re-

lease puts the employer on definitive notice that the employee has cooperated with the Board, and thus calls into play the express statutory protection against harassment or retaliation against witnesses found in Section 8(a)(4) of the NLRA. *See NLRB* v. *Scrivener*, 405 U.S. 117 (1972). "If retaliation ensues, the Board will have no trouble establishing the employer's knowledge. Where the Board's burden has been so greatly simplified, the employer may be inhibited from retaliatory action." [19] This situation would be similar to the familiar union practice of sending an employer a letter or telegram identifying the employees on the union's in-plant committee during an organizational campaign. Unions employ this tactic so that if an employee organizer is discharged or otherwise disciplined, the employer's knowledge of the employee's union activities will be clearly established.

In any event, there is no empirical evidence to support the Board's hypothesis that earlier disclosure of witness statements would cause employees to cease supplying statements to the Board. After a successful FOIA suit against the Board,[20] an empirical study of the influences on employees in representation elections was conducted. The results of that study show that many of the Board's operating assumptions as to how employer or union conduct affects employee choice in elections are absolutely erroneous. *See* Getman & Goldberg, *Union Representation Elections: Law and Reality*, 1976. Similarly here, there is no

[19] *The Impact of the FOIA on NLRB Discovery Procedures*, 10 U. Mich. J. of L. Ref. 476, 482 n. 47 (1977).

[20] *Getman* v. *NLRB*, 450 F.2d 670 (D.C. Cir. 1971), stay denied, 404 U.S. 1204.

empirical evidence to support the Board's supposition that witness statement disclosure would inhibit employee frankness with the Board.[21]

The insubstantial nature of the Board's claims of *per se* interference from disclosure is also indicated by the fact that substantially all of the district courts examining statements *in camera* have found the Board's Exemption 7(A) claim unwarranted. While several of these decisions were reversed when courts of appeals accepted the Board's *per se* nondisclosure claim, it remains significant that experienced district court trial judges, vested with initial responsibility for determning whether specific harm to enforcement proceedings would occur, found no prospect of such harm.

Cessna Aircraft Co. v. *NLRB*,[22] is illustrative. There the court found: "After review of the two statements of witnesses, *in camera*, the Court . . . finds as a fact that disclosure of the two statements in question will not interfere with enforcement proceedings." 405 F.Supp. at 1052, 90 LRRM at 3340. Judge Gagliardi made similar findings in *Title Guarantee Co.* v. *NLRB*.[23] "The Court has reviewed the material in question and concludes that release . . . would not block further information of the same type from similar sources nor would it stifle effective preparation of the case. In addition, it does not ap-

[21] *See* 51 St. John's L. Rev. 251, 268 n. 92 (1977).

[22] 405 F.Supp. 1042, 1052, 90 LRRM 3339, 3340 (D. Kan. 1975), rev'd on other grounds, 542 F.2d 834 (10th Cir. 1976).

[23] 407 F.Supp. 498, 504-05, 90 LRRM 2849, 2853 (S.D.N.Y. 1975), rev'd on other grounds, 534 F.2d 484 (2d Cir. 1976).

pear that the specific enforcement proceeding would be harmed." 407 F.Supp. at 50, 504-05, 90 LRRM at 2853.[24]

2. *The EEOC's use of face-to-face factfinding procedures refutes the Board's theory that pretrial secrecy is essential to its enforcement proceedings*

Although the Board speculates that pretrial disclosure of witness statements would impede its enforcement of the NLRA, procedures recently implemented by the Equal Employment Opportunity Commission and decisions under Title VII (42 U.S.C. 2000e *et seq.*) indicate that a statute protecting employees against unfair practices by employers and unions can be enforced without such secrecy.

The EEOC has recently provided by regulation (29 CFR § 1601.15(c))[25] for face-to-face factfinding to expedite processing and settlement of Title VII charges of employment discrimination "in most instances."

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[24] *Accord, McDonnell Douglas Corp.* v. *NLRB, supra,* 92 LRRM at 2074, 2075; *Deering Milliken, Inc.* v. *Nash,* 90 LRRM 3138 (D.C. S.C. 1975) aff'd in relevant part, 548 F.2d 1131 (4th Cir. 1977); *Maremont Corp.* v. *NLRB,* 91 LRRM 2804, 2808-2809 (W.D. Okla. 1976) rev'd on other grounds, —— F.2d ——, 93 LRRM 2799 (10th Cir. 1976).

[25] Section 1601.15(c) provides:

> The Commission may require a fact finding conference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain where there is a basis for negotiated settlement of the charge.

BNA, *EEOC Compliance Manual,* § 14.7, p. 14:0003. During this process the alleged discriminatee and the employer or union are brought together "to accelerate the investigation of a charge" and sharpen areas of agreement and disagreement. *Id.* at § 14.2, p. 14:0001. This is facilitated by having the charging party and the respondent fully state their positions and facts concerning each alleged unlawful act in detail. The EEOC Compliance Manual describes this process as follows (*id.* at § 14.5(c), p. 14:0003):

> Each allegation of the charge will be closely examined and fully discussed; the charging party will be allowed ample time to explain and support each allegation, the respondent to present and defend its position.

This process is a graphic refutation of the Board theories on premature disclosure of its case and discouraging employee willingness to come forward with the facts. The EEOC process requires the disclosure of all pertinent facts and theories in the face-to-face factfinding process. Should the EEOC later sue, the respondent will be apprised of the major facts and issues from the Commission's chief witnesses. But neither this fact, nor identification of the employees supporting Title VII charges is deemed a hazard to the EEOC's enforcement proceeding. In fact, the EEOC finds that the process spurs negotiated settlement of charges.[26] And if a charging party fails

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[26] The former Regional Director of the Board's Philadelphia Regional Office felt that with disclosure of information from NLRB investigative files "respondents may approach settlements more realistically . . . [and] more settlements may be obtained . . ." Samoff and Falkin, *The Freedom of Information Act and the NLRB,* 15 B.C. Ind. & Com. L. Rev. 1267, 1285 (1974).

to timely participate in the factfinding conference, "the charge will be dismissed." BNA, *EEOC Compliance Manual*, § 14.7, p. 14:0004. In short, while the federal agency charged with preventing racial, sexual, religious and national origin discrimination *requires* participation in a process that apprises respondents of the substance of a future enforcement proceeding and identifies the employees involved, the NLRB should not be heard to speculate, without any supporting evidence, that pre-hearing disclosure of witness statements (which would contain similar information) would interfere with its enforcement proceeding.

3. *The Board's theory of potential interference has no relevance to many types of witness statements to which its absolute nondisclosure policy is applied*

Even if there were support for the Board's premise that fear of retaliation through the employment relationship would, as a general rule, deter employees from providing statements which could be disclosed to their employers prior to a hearing, that premise is not nearly broad enough to sustain the Board's nondisclosure policy. For the danger envisioned by the Board simply has no relevance to many kinds of witness statements to which the agency's nondisclosure policy is applied. For example, the Board refuses to disclose statements of former employees, charging parties, exculpatory employee statements, supervisor's statements in union unfair labor practice cases, statements of union officials and those of individuals without connection to the employer or the union, even though none of these situations presents

the kind of danger of intimidation and coercion which the Board offers as the main justification for its claim of exemption.

Consideration of the statements of former employees is illustrative. The question of the disclosability of EEOC investigatory file statements of former employees was presented in *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, —— F.2d ——, 16 FEP Cases 680 (4th Cir. 1978). The Fourth Circuit affirmed the ruling of the district court that such statements were disclosable. The EEOC, like the Board here, had contended "for a strict *per se* rule of nondisclosure." *Id.* at 686. The Fourth Circuit noted that there was "no warrant" for such a rule and that "the 1974 Amendments clearly proscribed" (*id.*) court acquiescence in "the use of a mechanical test." *Id.* at 685. Moreover, the harms of disclosure asserted by the Board are plainly absent in the case of former employees. A former employee has no fear of on the job retaliation, no matter how subtle the opportunities for job harassment that the Board may conjure. For the same reason, there is no inhibition on future witness cooperation with the Board. As the Fourth Circuit observed, the EEOC could not argue "that the district court's finding, after such [*in camera*] review, that disclosure would not have a chilling effect on present employees or would not interfere with the investigation [was] erroneous." *Id.* at 685-686.[27]

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[27] As the Board did not submit the statements at issue here for *in camera* examination, it is possible that former employee statements may be involved.

The same is true of statements of charging parties. The Board is required under Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), to serve a copy of any charge of an unfair labor practice "upon the person against whom such charge is made."[28] This Congressional requirement, therefore, makes the identity of a charge-filer known to the employer. In such circumstances, it is impossible for the Board to show that disclosure of such a charge-filer's statement could either inhibit such an individual's cooperation or subject him to a greater threat of retaliation.[29]

Nor can the Board justify nondisclosure of statements tending to exculpate a respondent in a Board proceeding. First, as to the Board's fear of retaliation or drying up of information sources, there is no problem whatsoever. For an employer has no motive to retaliate against an employee giving evidence to the Board that the employer did not commit any unfair labor practices charged. *Temple-Eastex, Inc.* v. *NLRB*, 410 F. Supp. 183, 92 LRRM 2915 (E.D. Tex. 1976). Nor will the employee be inhibited from cooperating with the Board in such a situation.[30]

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[28] A similar requirement is imposed under Title VII. See § 706(b) which requires notice of the "date, place and circumstances of the alleged unlawful employment practice" to the respondent.

[29] As is the EEOC practice, *see supra*, pp. 23-24, the NLRB will dismiss the charge of an uncooperative charging party. See NLRB Case Handling Manual, Part I, Section 10056.1 (hereafter "NLRB Manual").

[30] The district court can determine the exculpatory nature of the statement in its *in camera* examination. *Temple-Eastex*

Secondly, as to the Board's contention that release of statements will hurt the government's case, the Board is on even weaker ground. For in *Berger* v. *United States*, 295 U.S. 78, 88 (1935), this Court noted that the obligation of the government in a law enforcement "prosecution is not that it shall win a case, but that justice shall be done." *Accord, EEOC* v. *Los Alamos Construction, Inc.*, 382 F.Supp. 1373, 1383, 8 FEP Cases 963, 971-972 (D.N.M. 1974). Certainly the Board cannot claim that any harm to its case from disclosure of exculpatory statements is a harm Congress intended Exemption 7(A) to cover. Conformity with the previous decisions of this Court and with the intent of Exemption 7(A) plainly indicate that the Board's *per se* nondisclosure rule is *per se* incorrect with respect to exculpatory statements.[31]

Next, consider statements by union officials. The Second Circuit opined that if statements of union officials were disclosed they "might not want to volunteer information for fear of compromising the union's position in negotiations." *Title Guarantee, supra*, 534 F.2d at 491. While this theory might have sufficed under the original FOIA, it is plainly insufficient to support exemption under § 7(A).

The district court in *Title Guarantee* followed the correct procedure and examined *in camera* the union

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v. *NLRB, supra. See, Impact of FOIA on NLRB Discovery*, 10 U. Mich. J. L. Ref. 476, 493 (1977).

[31] Even if the Board, in a future case, could demonstrate that there would be harm from disclosure of other parts of a statement containing exculpatory matters, it would be required to disclose the latter under the "segregable record" provisions of §§ (a) (4) (B) and (b) of the FOIA.

official's statement therein and concluded (407 F. Supp. at 505):

> [R]elease of the information would not block further information of the same type from similar sources nor would it stifle effective preparation of the case.

While the Board can argue that disclosure of a particular union offiical's statement would compromise a union negotiating position, the Board bears the burden of proving this interference in a particular case, and the district courts, like the *Title Guarantee* district court, should test this by *in camera* examination. *McDonnell Douglas Corp.* v. *NLRB*, *supra*, 92 LRRM at 2073-2074. Certainly, not every statement given by a union official will concern the union's negotiating stance. This is precisely why the kind of "mechanical test . . . enunciated in *Title Guarantee*" was proscribed by Congress in 1974 "in favor of 'a case-by-case' factual inquiry in determining whether to require the disclosure of investigatory records." *Charlotte-Mecklenburg Hospital*, *supra*, —— F.2d at ——, 16 FEP Cases at 685.

Also exempt from disclosure under the Board's interpretation of FOIA § 7(A) are statements of supervisors in cases involving charges of union unfair labor practices. Yet the Board's conjecture about potential retaliation against witnesses in the subtleties of the employer-employee relationship is totally inapplicable where the supervisor gives evidence against a union. Nor will there be any general reluctance on the part of supervisors to give future statements in cases against unions.

A final example of the error of the Board's *per se* approach is found in statements of individuals who

are not employees, union officials or supervisors. Individuals who have no direct relationship to the union or the employer may give statements in the Board's investigation of an unfair labor practice charge. Such persons are not in the employer-employee relationship and not subject to retaliation, yet the Board applies its nondisclosure policy to their statements as well.

In sum, it is plain that disclosure of many kinds of statements taken in the course of the Board's investigations does not involve even the theoretical harms to enforcement proceedings that the Board posits as its proof of interference to support its Exemption 7(A) claim. The Board's treatment of these kinds of statements makes clear why Congress chose to reject a mechanical approach and put the agency to its proof in the particular case to sustain a claim of exemption. That the Board has utterly failed to do here.

II. FOIA EXEMPTION 5 DOES NOT PERMIT THE BOARD TO WITHHOLD PURELY FACTUAL STATEMENTS SWORN TO BY PERSONS WHO HAVE BEEN DESIGNATED TO BE CALLED AS BOARD WITNESSES

The Board also claims that the witness statements are either "intra-agency memorandums" or its attorney's "work product", and therefore exempt from disclosure under Exemption 5 of the FOIA.[32] The

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[32] That exemption provides (5 U.S.C. § 552):

> (b) This section does not apply to matters that are—
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> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . .

Board's construction of this exemption has found little court support,[33] and is markedly at odds with this Court's recent explicit holdings.

A. The Statements Are Not Intra-agency Memorandums Containing Deliberative Matter but Rather Contain Mere Factual Data Unprotected by Exemption 5

The cited cases (in footnote 33) which reject the Board's Exemption 5 arguments properly interpret this Court's holdings in *Environmental Protection*

In construing whether Exemption 5 applies, a two-step analysis should be undertaken. First, a determination is made of whether the document is an inter- or intra-agency memorandum. Only after the requested material passes this first test ought the Court decide if the Board's work product theory has any merit. *See The Impact of the FOIA on NLRB Discovery Procedures,* 1977 U. Mich. J. of L. Ref. 476, 485-486.

[33] For several of the cases rejecting both the Board "memorandum" and "work product" theories, *see e.g.: Title Guarantee Co.* v. *NLRB,* 407 F.Supp. 498, 502-03 (S.D.N.Y. 1975), discussed with approval in dictum in *Title Guarantee* v. *NLRB, supra,* 534 F.2d at 492 n. 15; *Deering Milliken, Inc.* v. *Irving,* 548 F.2d 1131, 1137-38 (5th Cir. 1977); *Poss* v. *NLRB,* 565 F.2d 654, 659 (10th Cir. 1977); *McDonnell Douglas Corp.* v. *NLRB,* 92 LRRM 2072, 2076 (C.D. Cal. 1976), appeal pending No. 76-1580 (9th Cir.), and cases cited therein; *Electri-Flex* v. *NLRB,* 412 F.Supp. 698, 703 (N.D. Ill. 1976); and *Maremont Corp.* v. *NLRB,* 91 LRRM 2804, 2807-2808 (W.D. Okla. 1976), rev'd on other grounds —— F.2d —— (10th Cir. 1976). *Cf., Charlotte-Mecklenburg Hospital Authority* v. *Perry,* —— F.2d ——, ——, 16 FEP Cases 680, 682 n. 5 (4th Cir. 1978); and *Kent Corp.* v. *NLRB,* 530 F.2d 612, 624 (5th Cir. 1976), cert. denied, 429 U.S. 920 (Disclosure of NLRB Final Investigation Reports denied, with the recognition that "[t]he contents of the reports are not primary information, such as verbatim witness testimony or objective data . . .").

Agency v. Mink, 410 U.S. 73 (1973), and *NLRB* v. *Sears, Roebuck & Co.,* 421 U.S. 132 (1974). These Supreme Court decisions make it clear that parties litigating with federal agencies are entitled to receive factual and investigative matters from the agency. Only if the requested document *itself* contains elements of the agency's deliberative discussions or policy-making processes does Exemption 5 even arguably apply. But even in such circumstances, factual material must be exercised, when possible, and revealed to the agency's litigating opponent. 5 U.S.C. 552(a)(4)(B), (b). *See Mink, supra,* 410 U.S. at 89. Accordingly, the statements in question here are clearly beyond the scope of Exemption 5, for the Board does not appear to argue that any traces of its case-handling deliberations are contained within the statements themselves. Rather, the Board merely urges that the statements are useful in evaluating the available evidnce (Br. at 45-46).

An analysis of the nature of the documents makes clear why the Board's presentation is so limited. As the district court observed, and as discussed above, the Board has never claimed that there is anything unusual about the witness statements involved here. (Pet. App. 62). They consist of nothing "other than an average statement obtained during a routine investigation." *Ibid.* Indeed, the statements are not even in memorandum or letter form (*ibid.*).[34]

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[34] *See Temple-Eastex, Inc.* v. *NLRB,* 410 F. Supp. 183, 185 (E.D. Tex. 1976) ("Both the prefixes 'inter' and 'intra' imply that the communication involved was transmitted from one government employee to another. Sworn statements by persons interviewed by the NLRB are not of this character.")

As the Board's brief and Case Handling Manual point out, witness affidavits are utilized as a *factual* tool in an investigation. They provide objective evidence by which the Regional office determines whether or not to issue a complaint, and thereafter permit the General Counsel on appeal to make a reasoned judgment over whether a case was properly dismissed. (See NLRB Br. at 45-48; and NLRB Case Handling Manual, Part I, Sections 10058.1 through 10058.5).[35] In short, as the Second Circuit stated:[36]

> the documents sought here are not 'memorandums' . . . they do not summarize or evaluate facts or contain recommendations for agency action based upon facts . . . the statements as a whole lack the deliberative quality associated with intra-agency memoranda and attorney's work product. See *NLRB* v. *Sears, Roebuck & Co.*, . . ., 421 U.S. at 159-160.

Accord, Soucie v. *David*, 448 F.2d 1067, 1077 (D.C. Cir. 1976), and cases cited.

Exemption 5 is also inapplicable because witness statements are generated by private citizens, not by agency personnel. *See Wu* v. *National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972); *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1971).

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[35] As this Court is well aware, the NLRB utilizes other internal memoranda to undertake its deliberative and policy-making functions. These documents include advice and appeals memoranda (*N.L.R.B.* v. *Sears, supra*, 421 U.S. 132), and final investigation reports (*Kent Corp.* v. *N.L.R.B., supra*, n. 33).

[36] *Title Guarantee Co.* v. *N.L.R.B., supra*, 534 F.2d at 492, n. 15.

Unless a document originates within an agency it is not an inter or intra-agency memorandum. *See* H. Rept. No. 1497, 89th Cong., 2d Sess. 10 (1966) ("[A] full and frank exchange of opinions would be impossible if all *internal communications* were made public." (emphasis added)); *The Impact of the FOIA on NLRB Discovery Procedures*, 10 U. Mich. J. L. Ref. 476, 485-486 (1977). Accordingly, the witness statements here involved fail to qualify as memoranda included within the definition of Exemption 5.[37]

B. The Work Product Doctrine Does Not Apply to Signed Witness Statements Obtained in the Board's Investigation

As an apparent fall-back argument, the Board argues that the "work product" privilege[38] permits it to retain purely factual material which is otherwise disclosable under this Court's decision in *EPA* v. *Mink* (Br. at 46-47). But as the Fifth Circuit observed in *Deering Milliken, Inc.* v. *NLRB*, *supra*, 548 F.2d at 1138, 94 LRRM at 2362-2363:

> The General Counsel argues that the work-product privilege is not limited by the factual-

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[37] In *Charlotte Mecklenburg Hospital* v. *Perry, supra*, 16 FEP Cases at 682 n. 5, the Court noted that the EEOC apparently abandoned any claim that Exemption 5 protected purely factual or investigatory reports. Also of significance is the fact that the "Guidelines For Processing of Requests Under the Freedom of Information Act" of the NLRB General Counsel do *not* recommend invoking Exemption 5 in denying requests for witness statements. *See* pp. 22-23, a9 a13, and a15 or the reprint of the Guidelines in BNA, *White Collar Report*, No. 957, Aug. 8, 1975, C-6, C-7, C-11, C-14 and C-16.

[38] The Board relies primarily on *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

deliberative distinction set forth in *Mink*; instead, this privilege embraces all factual material assembled for trial by a litigant's attorney or other representative.

We cannot accept the General Counsel's interpretation of exemption 5. To allow such a broad exemption under the work-product rule would frequently swallow the distinction between factual and deliberative matters so carefully delineated by the Court in *Mink*. The General Counsel's argument would lead to the anomalous result of withholding factual material despite the Supreme Court's recognition that the same material would not be withheld under executive privilege because it 'would generally be available for discovery by private parties in litigation with the government.' *Mink*, 410 U.S. at 88. Therefore, we view the factual-deliberative distinction emphasized in *Mink* relevant to a consideration of the work-product privilege (Footnote omitted).

In support of its "work product" theory, the Board cites extensively to the decision in *Hickman* v. *Taylor* (Br. at 46-47, n. 26), but fails to mention several of the Court's premises which cut against the Board's position. In *Hickman*, the Court repeatedly stressed that production of the requested material was not shown to have been necessary. 329 U.S. at 508-509. Thus, the requesting attorney already had exercised his broad discovery rights under the Federal Rules of Civil Procedure and had received extensive responses to detailed interrogatories. The opportunity to take depositions also was noted, as well as the fact that the petitioner was free to examine public testimony of the witnesses on the same facts which had been given before the United States Steamboat Inspectors. (*Ibid*).

The Court then pointedly said that it was *not* holding that all written materials obtained or "prepared" by an adversary's counsel with an eye toward litigation were necessarily free from discovery in all cases. 329 U.S. at 511-512. It stated (*ibid*):

> Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning.

The Court then held that Rule 30(b), Fed. R. Civ. Pro., gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured from witnesses. The Fifth Circuit's holding here thus is consistent with *Hickman* v. *Taylor*. The court below merely rejected the Board's arguments favoring *per se* application of the FOIA exemptions, and rather, would permit the district court to examine the permissibility of disclosure on a case-by-case basis. See 563 F.2d at 730-733.[39]

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[39] The Board indicates (Br. at 47) that the Court in *Hickman* v. *Taylor* also noted that special care should be taken in

In contrast to the broad discovery available to the requesting party in *Hickman* v. *Taylor*, discovery in NLRB proceedings is almost negligible.[40] Indeed, the Board acknowledges that even when settlement is a real possibility, the Regional Offices "openly discuss" the General Counsel's evidence but still refuse to reveal even to respondents the names of witness. (Br. at 19-20). That fact alone eliminates the pertinence of *Hickman* v. *Taylor* to the Board's work product assertions.[41] *See Labor Law—Pre Hearing Discovery of Employees' Statements*, 1970 N.C.L.R. 368, 376-377. More to the point is the observation of Mr.

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ordering the disclosure of "oral statements" of witnesses, because of problems it foresaw in requiring an attorney to repeat personally what he was told by a witness. The oral statements which concerned the Court involved attorney Fortenbaugh's recollection of information that persons had told him which had never been reduced by him to written memoranda. 329 U.S. at 498-499, 512-513. No such statements are involved here. The Board's Case Handling Manual, Part I, Section 10058.5 requires that witness statements be reduced to writing and then sworn to by the witness. See also the NLRB's Rules and Regulations, 29 C.F.R. § 102.118(d).

[40] *See* Note, 1976 Geo. Wash. L. Rev. 114, 116-117; *The Impact of the FOIA on NLRB Discovery Procedures, supra*, 1977 U. Mich. J. of L. Ref. at 477-479; Connolly and Fox, *Employer Rights and Access to Documents Under the Freedom of Information Act*, 1977 Fordham L. Rev. 203, 230-234.

[41] Rule 26(b)(3) of the Federal Rules of Civil Procedure likewise does not assist the Board's position (Br. at 48 n. 28, and 50 n. 30). The rule omits any reference to "witness statements" when it states that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Justice Jackson in his concurring opinion in *Hickman* v. *Taylor* that (329 U.S. at 519):

> There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interests of justice require that such statements be made available.

Such circumstances certainly exist here. *Charlotte-Mecklenburg Hospital Authority* v. *Perry, supra*, —— F.2d at ——, 16 FEP Cases at 684-685.

Such limited discovery as is available to Board litigants is provided for in Section 112.118(b)(1) and (2) of the Board's Rules and Regulations.[42] The regulations prohibit any discovery prior to the hearing, and allow disclosure of witness statements only after the witness has testified at the hearing. This section of the Board's rules is essentially identical to the Jencks Act, 18 U.S.C. § 3500 (1957). (Board Br. at 15, n. 2). This Court's most recent pronouncement on the Jencks Act as it relates to the work product privilege is completely at odds with the Board's position. See *Goldberg* v. *United States*, 425 U.S. 94 (1976).[43]

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[42] 29 C.F.R. § 112.118(b)(1) and (2).

[43] The Board relies upon two other Jencks Act decisions which are not apposite. In *United States* v. *Nobles*, 422 U.S. 225, 238-239 (1975), the Court discussed the work product doctrine in dictum, but stated that it would not undertake to delineate the scope of the doctrine because, in the case at bar, the defense had waived such right as may have existed to invoke its protections. 422 U.S. at 239. The Court's subsequent delineation of the doctrine is found in *Goldberg* v. *United*

In *Goldberg*, this Court held that a writing prepared by a Government lawyer relating to the subject matter of the testimony of a Government witness that had been signed by the witness was producible under the Jencks Act and was not rendered nonproducible because the lawyer interviewed the witness and wrote the statement. 425 U.S. at 98. The Court saw nothing in the Jencks Act that would prevent the production of the statements on the ground that they consituted the attorney's "work product". 425 U.S. at 101-102.[44] In discussing *Hickman* v. *Taylor*, and *United States* v. *Nobles* (*supra*, n. 43), the Court stated that its decision would not undermine the work

States, discussed below but uncited by the Board. Also, *Palermo* v. *United States*, 360 U.S. 343 (1959), simply involved a determination of whether the memorandum involved was a "statement" under the Jencks Act definition. No such issue arises here.

[44] Indeed, the government virtually conceded at one point that no broad work product exemption existed. *See* 425 U.S. 102, n. 5, which excerpts the following statement from the government's brief:

> "We believe that there is no broad attorney's work-product exception to the Jencks Act that shelters statements relating to the subject matter of the tesimony of a witness merely because the statements were obtained by a government attorney rather than a government investigator. For if what is involved is truly the statement of the *witness*—that is, a statement written and signed or otherwise formally adopted or approved by him or a substantially verbatim recording of an oral statement—by definition it does not contain the mental impressions, trial strategy or personal beliefs of an attorney. Such material thus implicates only tangentially, if at all, the policies underpinning the work product doctrine." Brief for United States 27-28.

product doctrine. The lawyer's mental impressions, personal beliefs, trial strategy and legal conclusions would still protected, and could be exercised from the witness' own statements when necessary under the relevancy defense contained in the Jencks Act. 425 U.S. at 106.[45] As this Court recently stated, decisions explaining the attorney's work product rule are "applicable to Government attorneys in litigation." *See NLRB* v. *Sears & Roebuck Co.*, *supra*, 421 U.S. at 154.

In summary, the witness statements involved here contain purely factual matter which reveal nothing about the Board's deliberative processes. The Board's argument that it need not disclose these statements because they are useful in its case evaluation is monumentally inconsistent with the legislative history of Exemption 5 and the decision in *EPA* v. *Mink*. Moreover, a statement signed by the witness is not covered by any work product privilege. *Goldberg* v. *United States*.

[45] Significantly, the Board's own regulations contain no specific mention of any work product privilege. The only defense to post-testimonial production of witness statements is that the statement contains matter "which does not relate to the subject matter of the testimony of the witness." 29 C.F.R. § 102.118(b) (2).

CONCLUSION

For the foregoing reasons and under the circumstances of this case, the decision of the Fifth Circuit below should be affirmed, and the Board ordered to turn over to the employer statements of persons which the Board has indicated it will call to testify at the hearing.

Respectfully submitted,

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